No. 15-35

IN THE

Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY,
EAST TEXAS BAPTIST UNIVERSITY, AND
WESTMINSTER THEOLOGICAL SEMINARY, PETITIONERS
v.
SYLVIA MATHEWS BURWELL,
SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the availability of a regulatory option for nonprofit religious employers to comply with the contraceptive mandate imposed by the Department of Health and Human Services eliminate either the substantial burden on religious exercise or the violation of the Religious Freedom Restoration Act that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)?

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BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

Amicus curiae, The Council for Christian Colleges and Universities, respectfully submits that the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

The Council for Christian Colleges and Universities (CCCU) is an international association of Christ-centered colleges and universities. The CCCU exists "[t]o advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." CCCU, About CCCU, http://www.cccu.org/about. Headquartered in Washington, D.C., the CCCU has 123 members in North America, all of which are regionally accredited colleges and universities with curricula rooted in the arts and sciences. In addition, the CCCU has another 60 affiliate member institutions with Christian missions. The CCCU's membership spans 33 states and 19 countries and has over 400,000 students enrolled and almost 2 million alumni.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and letters of consent are on file with the Clerk's Office.

East Texas Baptist University and Houston Baptist University are members of the CCCU. Like all CCCU member institutions, these universities are committed to applying Christian doctrine and belief to all areas of human endeavor. That includes when life begins, the morality of ending an innocent life, and the responsibility of people and institutions for complicity with provision of abortifacient products. For that reason, in an unprecedented series of lawsuits, 15 CCCU member institutions have sought to enjoin application of the federal requirement that requires member institutions to provide their students and employees with cost-free access to FDA-approved abortifacients.[2]

The Fifth Circuit's decision in this case and the similar decisions by the Second, Third, Seventh, Tenth, and District of Columbia Circuits have significant implications for the health insurance decisions of CCCU's member institutions. This is perhaps best demonstrated by the recent decision of Wheaton College to end its student health insurance plan. After an adverse ruling by the Seventh Circuit, *Wheaton Coll.* v. *Burwell*, --- F.3d ---, 2015 WL 3988356 (7th Cir. July 1, 2015), Wheaton made the difficult decision to terminate its student health insurance plan to avoid being complicit in providing abortifacient drugs and devices to Wheaton's students. Wheaton College Health Insurance Announcement (Jul. 10, 2015) *available at* http://www.wheaton.edu/Student-Life/Student-Care

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[2] The list of all CCCU member institutions' lawsuits is provided in Appendix A.

/Student-Health-Insurance/Past-Announcements/July-10th-Announcement (last visited Aug. 7, 2015).

The CCCU believes that the religious liberty guaranteed by the Constitution and the Religious Freedom Restoration Act is inconsistent with the Fifth Circuit's decision. As this Court recently explained, federal judges may not substitute their views of moral complicity for those of religious individuals and organizations. Such questions are the very type of government interference with the exercise of religion that the Religious Freedom Restoration Act was intended to prevent.

STATEMENT

Religious colleges and universities have played an important role in the history of our nation. Many of the nation's most well-known institutions of higher education including Harvard, Yale, Princeton, and Rutgers were founded by churches and denominations. Throughout the nation's history, religious institutions of higher learning have wrestled with the moral and practical implications of Christianity. Because of this, for instance, religious institutions were motivated to train abolitionists in the early 1800s who helped contribute to the end of slavery decades later. For example, the great revival preacher Charles Finney became president of Oberlin College in 1850, then a Presbyterian college, which was a hotbed for abolitionists. Harriet Beecher Stowe was the daughter of the president of Lane Seminary in Cincinnati, a center of abolitionist training in the 1830s.

The commitment to wrestle with the moral implications of being centers of learning with deep Christian convictions continues at religious colleges and universities throughout the country to this day. East Texas Baptist University, Houston Baptist University, and Westminster Theological Seminary are but three of the score of religious colleges and universities throughout the country whose commitment to Christian teaching and practice compels them to object to any participation in the provision of some or all of the contraceptive services required by the Affordable Care Act.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision and the similar decisions from other circuits of the United States Court of Appeals are flawed because they expropriate to the judiciary the theological decision of when an organization is complicit in the taking of innocent life. The District of Columbia Circuit has suggested that the government's accommodation of religious organizations like Petitioners and CCCU's other member institutions allows them to wash their hands of any involvement in the provision of morally objectionable contraceptive services to their employees and students. As the Court explained in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014), the judiciary should not be in the business of making national determinations of what does and does not constitute moral complicity.

The government's decision to exempt some religious employers from providing contraceptive coverage while requiring others to comply with the mandate demonstrates that the government's approach is not the least restrictive means necessary to advance its interests. The government concedes that when religious organizations that oppose the use of contraceptives generally or a subset of some forms of FDA-approved contraceptives that may operate as abortifacients more specifically, hire co-religionists, their employees are "less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). And the government acknowledges that exempting certain religious employers does not impair its interests. Petitioners, like all of CCCU's member institutions,

restrict their hiring of full-time faculty and administrators to co-religionists; in fact, such policy is a requirement for membership in the CCCU. These institutions engage in much of the same religious exercise that exempt religious employers engage in. They teach the faith, engage in regular corporate worship, pray, and provide faith-based volunteer and social services. In other words, the government's distinction between which groups are exempt and which are administratively accommodated is arbitrary and not necessary for the effectiveness of the Affordable Care Act nor allowed by the Constitution which forbids arbitrary distinctions in the treatment of religious groups. The government's interests would not be frustrated by exempting Petitioners (and other similar religious organizations) from complying with the contraceptive mandate. Indeed, this is precisely what the Religious Freedom Restoration Act requires.

ARGUMENT

I. The Fifth Circuit's decision conflicts with this Court's decision in *Hobby Lobby* because it resolves an inherently theological question.

The Fifth Circuit's decision fails to recognize that "[w]hat amounts to 'facilitating immoral conduct' [or] 'scandal' . . . are inherently theological questions which objective legal analysis cannot resolve and which 'federal courts have no business addressing.' " *Priests for Life* v. *United States Dep't of Health & Human Servs.*, No. 13-5368, 2015 U.S. App. LEXIS 8326, at *29 (D.C. Cir. May 20, 2015) (Brown, J. dissenting) (internal citations omitted); accord *Univ. of Notre Dame* v. *Burwell*, 786 F.3d 606, 627-28 (7th

Cir. 2015) (Flaum, J. dissenting) ("[T]he majority here sides with HHS, and "in effect tell[s] the plaintiff[ ] that [its] beliefs are flawed." (citing *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014)) (initial alteration added, remaining alterations in original)).

In *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Court faced a similar argument "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." 134 S. Ct. at 2777. The Court dispatched the argument by noting that the issue presented "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Id.* at 2778. The Court refused to arrogate to the judiciary the authority to provide a "binding national answer to this religious and philosophical question." *Ibid.* Nonetheless, that is exactly what the Fifth Circuit did below.

The problem with the judiciary resolving the inherently theological and philosophical issue of when a person is morally complicit is perhaps best demonstrated by the D.C. Circuit's characterization of the accommodation offered to religious organizations. The D.C. Circuit believes "the accommodation provides Plaintiffs a simple, one-step form for opting out and *washing their hands* of any

involvement in providing insurance coverage for contraceptive services," including those that the Petitioners consider to be abortifacients. *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014) (cert. pet. pending) (emphasis added). The sin of washing one's hands of involvement in the death of innocent life is central to Christianity. The Bible recounts that the Roman prefect, Pontius Pilate, before ordering that Jesus be crucified, "took water and washed his hands in the sight of the crowd, saying, 'I am innocent of this man's blood. Look to it yourselves.' " Matthew 27:24 (New Am. Bible Rev. Ed.). Nonetheless, from that time until now, Christianity has held Pilate to be morally culpable for Jesus's death despite his washed hands. (E.g., Apostles Creed ("[Jesus] suffered under Pontius Pilate, was crucified, died, and was buried.").)

The Fifth Circuit's determination of the theological issue of when a person is responsible for complicity in the death of innocent life is inconsistent with the religious beliefs of Petitioners (and many other religious individual and organizations). That conflict results in a substantial burden on Petitioners' religious exercise. The Fifth Circuit's ruling to the contrary is inconsistent with the Court's decision in *Hobby Lobby*, and the protections afforded by the Religious Freedom Restoration Act.

II. Imposition of the contraceptive mandate on religious entities like Petitioners does not advance a compelling government interest in the least restrictive manner.

It is difficult to understand how enforcing the contraceptive mandate against Petitioners is the least restrictive manner in which to protect an interest of the highest order (see 42 U.S.C. § 2000bb-1), given that the government has already conceded that it does no harm to exclude churches and integrated auxiliaries from the mandate.

Under the Affordable Care Act, employer-sponsored group health plans must meet minimum coverage requirements. These requirements include covering preventive health care services without requiring health plan participants or beneficiaries to share the costs of these services through copayments, deductibles, or co-insurance. 42 U.S.C. § 300gg-13.

The Departments of Health and Human Services, Labor, and Treasury issued regulations that require employer-sponsored group health plans to include the full range of FDA-approved contraceptive services as preventive health care services. See 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); Health Resources and Services Administration, Women's Preventive Services Guidelines, *available at* http://www.hrsa.gov/womensguidelines (last visited Aug. 7, 2015).

The Departments exempted religious employers, but limited the scope of "religious employers" to those non-profit organizations that are exempt from filing informational tax returns under the Internal

Revenue Code. 45 C.F.R. § 147.131(a) (referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)). The Internal Revenue Code provides that all tax-exempt organizations must file informational tax returns except, inter alia, "churches, their integrated auxiliaries, and conventions or associations of churches, . . . or the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A). The Departments theorized that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

Recognizing that many religious organizations that are not "churches, their integrated auxiliaries, . . . or . . . religious orders" objected to providing coverage for some or all contraceptives, the Departments devised an "accommodation" for nonexempt religious employers. See 45 C.F.R. § 147.131(c)(1). The accommodation allows certain religious nonprofit employers to fulfill their statutory obligation to provide coverage including all FDA-approved contraceptives. A similar accommodation exists for religious colleges and universities who arrange for student health insurance coverage. 45 C.F.R. § 147.131(f).

Religious colleges and universities cannot be exempt employers. Even a religious college or university that is affiliated with a church or an association of churches cannot be an "integrated

auxiliary" because colleges and universities receive more than 50% of their support from students and outside sources.[3] See 26 C.F.R. § 1.6033-2(h)(1), (h)(4). Consequently, religious colleges and universities must comply with the contraceptive mandate.

The government's decision to exempt fully a category of entities—religious employers—regardless of whether they even object to contraceptive coverage cannot be squared with its refusal to exempt other religious groups like Petitioners who actually do have religious objections. See *Hobby Lobby*, 134 S. Ct. at 2777 n.33. The government offers no persuasive reason for "distinguishing between different religious believers—burdening one while [exempting] the other—when [the government] may treat both equally by offering both of them the same [exemption]." *Id.* at 2786 (Kennedy, J. concurring). After all, "[e]verything the government says about [exempt religious employers] applies in equal measure to" Petitioners. *Gonzales* v. *O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006).

The government concedes that exempting churches and their integrated auxiliaries "does not undermine the governmental interests furthered by

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[3] Seminaries that are affiliated with a church or association of churches are exempt from the contraceptive mandate because they are exempt from the internal-support requirement. See 26 C.F.R. § 1.6033-2(h)(5). Westminster Theological Seminary is not exempt because it is not affiliated with a church or association of churches.

the contraceptive coverage requirement [because they] employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. Petitioners and all CCCU member institutions restrict their hiring practices for full-time faculty, administrators, and in many instances, all positions, to Christians. (See Pet. at 12-14 (citing Slaon Decl. 2-3; Oliver Decl. 3; Jue Decl. 3-5); CCCU, Members & Affiliates: Membership Requirements, *available at* http://www.cccu.org/members_and_affiliates (last visited Aug. 8, 2015) ("Member campuses must have a continuing institutional policy and practice . . . to hire as full-time faculty members and administrators (non-hourly staff) only persons who profess faith in Jesus Christ.").) Thus, the government cannot reasonably contend that extending the exemption to Petitioners and avoiding substantially burdening Petitioners religious exercise would undermine the government's interests.

The government's method for distinguishing between exempt religious employers and religious employers who must comply with the contraceptive mandate bears no relation to the civil rights of religious organizations that the government is obligated to protect. The Internal Revenue Code exempts churches from filing informational tax returns but not other 501(c)(3) organizations. This is understandable given that requiring churches to provide detailed financial information including the identity of all their financial supporters would impose a substantial administrative burden on

churches and could serve to chill religious exercise. But it is beyond strange to apply a distinction created by Congress to determine which nonprofit organizations must file informational returns with the IRS to decide which religious nonprofit organizations should be exempted from the contraceptive mandate to ensure that their civil rights are protected.

The government's distinction between religious nonprofits is even less defensible when applied to religious colleges and universities. Like houses of worship, the very purpose for which religious colleges and universities exist is "the propagation of a religious faith." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). For that reason, Petitioners and CCCU's member institutions engage in many of the same religious activities as houses of worship and their integrated auxiliaries including organized worship, corporate prayer, pastoral counseling, communal singing of religious songs, proselytizing, faith-based social service, and evangelistic outreach.

The government's distinction thus ultimately discriminates among "types of institutions on the basis of the nature of the religious practice [that the government perceives] these institutions are engaged in." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008). Such distinctions are at the least constitutionally suspect. See *ibid.* The government's definition of religious employer favors religions, religious denominations, and religious organizations that fit neatly into the government's view of what constitutes religious activity, while disadvantaging groups that exercise their faith

through other means such as fulfilling their educational missions or who for theological reasons are organized in ways that does not fit neatly within the government's box.

The incongruity of the government's distinction is evidenced by Petitioner Westminster Theological Seminary. Westminster's founders left Princeton Theological Seminary because of theological disagreements with the Presbyterian Church in the United States of America. For theological reasons, they decided to establish the seminary independent of the Orthodox Presbyterian Church, the denomination that the same individuals were simultaneously involved in founding. If the seminary was affiliated with the Orthodox Presbyterian Church, it would be exempt from the contraceptive mandate and the government concedes that would not frustrate its interests. Because Westminster is unaffiliated, it must comply with the mandate. The civil rights of an institution of higher education should not vary based upon whether that institution is or is not affiliated with a church or other house of worship.

In fact, the "religious employer" definition is itself offensive to religions when it defines religious employers essentially as including only houses of worship. This may be consistent with how the U.S. Department of Health and Human Services Administration views "religion." But wholly aside from the problems inherent with the accommodation, it likely violates RFRA for the Government to define religious employer in such a way as to exclude religious organizations like the CCCU's members.

The religious-employer exemption demonstrates that the government's accommodation for nonexempt religious employers is not the least restrictive means for advancing the government's interests.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

In addition to East Texas Baptist University and Houston Baptist University, the following CCCU member institutions have initiated litigation to enjoin the contraceptive mandate as to at least abortifacient contraceptive services:

1. *Southern Nazarene Univ.* v. *Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (granting preliminary injunction against enforcement of the contraceptive mandate) *rev'd sub nom. Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, --- F.3d ---, 2015 WL 4232096 (10th Cir. Jul. 14, 2015) (cert. pet. pending)

   The following CCCU members are parties:

   Southern Nazarene University

   Oklahoma Baptist University

   Oklahoma Wesleyan University

2. *Geneva Coll.* v. *Sebelius*, 960 F. Supp. 2d 588 (W.D. Pa. 2013) (granting preliminary injunction against enforcement of the contraceptive mandate) *rev'd sub. nom. Geneva Coll.* v. *Secretary U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015) (time for filing petition for writ of certiorari extended to August 11, 2015)

   The following CCCU member is a party:

   Geneva College

3. *Wheaton Coll.* v. *Burwell*, 50 F. Supp. 3d 939 (N.D. Ill. 2014) (denying preliminary injunction against enforcement of the contraceptive mandate) *aff'd* --- F.3d ---, 2015 WL 3988356 (7th Cir. 2015) (time for filing petition for writ of certiorari expires September 29, 2015).

   The following CCCU member is a party:

   Wheaton College

4. *Dordt Coll.* v. *Sebelius*, 22 F. Supp. 3d 934 (W.D. Ia. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to Eighth Circuit is pending, argued in December 2014)

   The following CCCU members are parties:

   Dordt College

   Cornerstone University

5. *Grace Schs.* v. *Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to Seventh Circuit is pending, argued in December 2014)

   The following CCCU members are parties:

   Grace College

   Biola University

6. *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013) (dismissed on mootness grounds)

The following CCCU member is a party:

Franciscan University of Steubenville

7. *School of the Ozarks, Inc.* v. *Sebelius*, --- F. Supp. 3d ---, 2015 WL 527671 (W.D. Mo. 2015) (granting summary judgment in favor of the government) (appeal to the Eighth Circuit is pending)

The following CCCU member is a party:

College of the Ozarks

8. *Louisiana Coll.* v. *Sebelius*, 38 F. Supp. 3d 766 (W.D. La. 2014) (granting summary judgment against government) (appeal to the Fifth Circuit is pending)

The following CCCU member is a party:

Louisiana College

9. *Colorado Christian Univ.* v. *Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to the Tenth Circuit is pending)

The following CCCU member is a party:

Colorado Christian University